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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF THE FORMAL
COMPLAINT AND REQUEST FOR
DECLARATORY JUDGMENT OF PAC-
WEST TELECOMM, INC. AGAINST QWEST
CORPORATION

) DOCKET NO. T-03693A-05-0875
) T-01051B-05-0875
)
) **PLAINTIFF'S REPLY IN**
) **SUPPORT OF MOTION IN**
) **LIMINE TO BAR REFERENCES**
) **TO VNXX TRAFFIC**
)

Qwest's Response to Pac-West's Motion in Limine does not contest the basic legal principle applicable to this motion. The Response does not dispute that collateral estoppel would bar Qwest from relitigating any issue that was actually litigated in a prior proceeding. See, e.g., Yavapai County v. Wilkinson, 111 Ariz. 530, 534 P.2d 735 (1975); Irby Constr. Co. v. Arizona Dep't of Revenue, 184 Ariz. 105, 907 P.2d 74 (App. 1995) (Department of Revenue cannot relitigate issue that was actually litigated in prior proceeding). Further, the Response does not dispute that the Commission based its decision in the prior proceeding on "the plain language of the specific contract terms" contained in the interconnection Agreement ("ICA") between Pac-West and Qwest.

Instead, the Response asserts that “the ISP traffic compensation issues decided by the Commission in Decision 68820 are not the same as those raised by Qwest in this proceeding.” Response at 3. In other words, Qwest contends that the legal arguments Pac-West seeks to bar now were not “actually litigated” in the prior proceeding. This is factually incorrect.

I. The Argument Advanced by Qwest Here Was Actually Litigated Before the Commission in the Prior Proceeding.

Qwest argues in this case that “Pac-West cannot use LIS facilities for VNXX service under the ICA, InterLCA and SPOP amendments.” Response at 3. Qwest also asserts that this core argument is “not the same as those raised by Qwest” in the prior VNXX proceeding. However, Qwest’s own briefing from the VNXX litigation reveals that this is fundamentally incorrect. The core assertion quoted above, tracks perfectly the text and the legal theory contained in Qwest’s Answer in the VNXX litigation:

Pac-West also ignores the plain language of the parties’ interconnection agreement (“ICA”) regarding the types of traffic that the parties have agreed to exchange. . . . The traffic types that the parties have agreed to exchange over the local interconnection trunks and through the ICA Single Point of Presence (“SPOP”) amendment are very specifically delineated in the ICA. As discussed below, the traffic for which Qwest disputes payment does not match the traffic type the parties agreed to exchange under the ICA. Due to Pac-West’s purposeful misuse and improper assignment of telephone numbers, the traffic Pac-West expects Qwest to exchange does not match any of the specifically defined traffic types and therefore is not traffic that the parties have agreed to exchange under the ICA.

See Qwest Corporation’s Answer (and Counterclaims) to Pac-West Telecom’s Complaint (August 22, 2005), p. 6, attached as Exhibit 1. Qwest continues by asserting that “Pac-West then knowingly misuses Qwest’s Local Interconnection

Service ("LIS") [for VNXX traffic] so that Qwest will believe it is obligated to route and transport calls to Pac-West disguised as "local" calls . . ." Answer p. 7. Count Four of the Qwest Counterclaim alleges that Pac-West improperly routes VNXX traffic over LIS-trunks. Answer p. 26. Qwest cannot reasonably assert that the argument it raises today – Pac-West cannot use LIS facilities for VNXX service under the ICA, InterLCA and SPOP amendments – was not litigated in the prior VNXX litigation. In fact, it was a controverted issue and one about which Qwest argued vehemently.

II. The Issue Raised by Qwest in This Proceeding Was Decided by the Commission in Decision No. 68820.

Qwest submits that "the Commission neither analyzed nor ruled on whether the ICA allows the routing of VNXX traffic over LIS." Response at 3. The unspoken but necessary implication of this reasoning is that the Commission could have awarded Pac-West compensation for VNXX ISP-bound traffic (as it did), and simultaneously concluded that the very same VNXX traffic was unlawful under the contract. This nonsensical result borders on ridiculous and is contrary to the Commission Decision. As explained in Decision No. 68820, the Commission examined the ICA closely and concluded that "because it does not exclude VNXX ISP-bound traffic," such traffic is subject to reciprocal compensation. Decision at 10. Had the Commission adopted Qwest's argument that VNXX traffic was unlawful under the contract, it never would have reached the issue of compensation. Granting a carrier compensation for traffic makes no sense at all if

the traffic in question violated the contract, or is unlawful. The Commission's conclusion that nothing in the ICA excluded the traffic in question was a necessary prerequisite to deciding that Qwest owed Pac-West compensation for the traffic.

III. The Deferral of Resolution of VNXX Issues Going Forward Applies Only Outside and Beyond the ICA.

Qwest submits that "Decision No. 68820 expressly disclaims that it reaches judgment on the merits of VNXX" and quotes language from the Decision confirming that the Commission "makes no findings concerning the appropriateness of VNXX arrangements on a going-forward basis." Decision at 11. However, the Decision indisputably reaches the merits of VNXX as to this particular contract, and these specific parties, and concludes that the contract does not exclude VNXX traffic. Where the decision references the appropriateness of VNXX on a going-forward basis, it is simply acknowledging that when a rule-making docket or a generic docket is opened to address VNXX, those proceedings will not be bound by Commission Decisions in a contract compliant proceeding, such as the VNXX proceeding that is unique to specific parties.

IV. Conclusion

Qwest seeks to "challenge Pac-West's use of VNXX when ordering services pursuant to the ICA, InterLCA, and SPOP amendments." Response at 5. This was exactly Qwest's goal in the prior proceeding. Qwest seeks to prevent Pac-West from using VNXX number assignments. In the prior case, after a careful reading of the Pac-West/Qwest ICA, the Commission decided that the ICA did not make any special provision for, or exclude, VNXX traffic and approved compensation for all ISP-bound

traffic including VNXX traffic. It goes without saying that VNXX traffic may not be prohibited generally without an amendment to the contract, a new ICA, or a rule of general applicability promulgated by the Commission. Qwest may take this issue up in any of these forums, but it is precluded from asserting in this case that the Pac-West / Qwest contract (as it stands today) excludes VNXX traffic.

Pac-West respectfully requests an order granting its Motion in Limine, thereby re-focusing this proceeding on the direct trunk transport dispute articulated in Pac-West's First Amended Complaint.

Respectfully submitted this 30th day of August, 2006.

OSBORN MALEDON PA

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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 JEFF HATCH-MILLER

3 Chairman

4 MARC SPITZER

5 Commissioner

6 WILLIAM MUNDELL

7 Commissioner

8 MIKE GLEASON

9 Commissioner

10 KRISTIN MAYES

11 Commissioner

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AUG 23 2005

OSBORN MALEDON PA *bw*

12 IN THE MATTER OF THE FORMAL
13 COMPLAINT OF PAC-WEST TELECOMM
14 SEEKING ENFORCEMENT OF THE
15 INTERCONNECTION AGREEMENT
16 BETWEEN PAC-WEST TELECOMM AND
17 QWEST CORPORATION

DOCKET NO. T-01051B-05-0495
T-03693A-05-0495

QWEST CORPORATION'S
ANSWER TO PAC-WEST
TELECOMM'S COMPLAINT TO
ENFORCE ITS
INTERCONNECTION
AGREEMENT, AND
COUNTERCLAIMS

18 Respondent Qwest Corporation ("Qwest") hereby responds to and answers the
19 complaint to enforce its interconnection agreement that Complainant Pac-West
20 Telecomm ("Pac-West") filed on or about July 13, 2005, and further, files its
21 counterclaims against Pac-West.

22 **INTRODUCTION**

23 **Intercarrier Compensation**

24 1. Pac-West's Complaint involves the complex question of intercarrier
25 compensation. There are two general traffic types to which intercarrier compensation
26 applies. Interexchange (toll) traffic is compensated through switched access charges,
27 while local traffic may be compensated either through a "bill and keep" or reciprocal
28 compensation arrangement between local carriers.

29 2. Local traffic is telecommunications traffic that originates and terminates in
30 a geographically-defined area that is approved by the Arizona Corporation Commission

1 (the "Commission"). These areas are called "local calling areas" or "extended area
2 service" ("EAS") areas. See e.g., A.A.C. R14-2-1102(8); A.A.C. R14-2-1302(9); A.A.C.
3 R14-2-1305; A.A.C. R14-2-1302(19). These geographically-defined areas allow for an
4 end-user customer's unlimited calling within these areas for a Commission-approved flat
5 rate.

6 3. With the introduction of competitive local services, the Federal
7 Communications Commission ("FCC") allowed for intercarrier compensation for the
8 exchange of this local traffic. This provided both incumbent local exchange carriers
9 ("ILECs") and competitive local exchange carriers ("CLECs") the opportunity to recover
10 the costs associated with interconnection for the exchange of local traffic through a per-
11 minute charge. "Bill and keep," on the other hand, allows for each carrier to bill their
12 end-user customer and keep the revenue, therefore eliminating the need for recording
13 traffic and billing for reciprocal compensation. The concept behind bill and keep is to
14 recover interconnection costs from the end-user customers of the telecommunications
15 network to which those end-user customers are connected. When the traffic that is
16 exchanged between local carriers is in balance, there is a presumption that each network
17 will incur similar costs.

18 4. Interexchange (toll) traffic is traffic that originates and terminates between
19 exchanges located in *different local calling areas*/EAS areas. Toll traffic is measured in
20 minutes of use, and is charged to the end-user customer by the end-user customer's
21 selected interexchange carrier ("IXC"). The IXC must pay originating access charges to
22 the originating carrier for the use of its network, and terminating access charges to the
23 terminating carrier for the use of its network to complete the call.

24 5. As described above, the type of traffic, either local or toll, is determined by
25 the geographic location of the end points of the calls. Based on these physical end points,
26 the telecommunications industry has developed a method of determining the general
27 location (i.e., local calling area/EAS area) for intercarrier compensation purposes based
28 on the telephone numbers of the originating and terminating end users. Telephone

1 numbers are displayed in the NPA/NXX format (in which the NPA is the area code and
2 the NXX is the central office code). The central office code is then followed by a
3 four-digit number which together constitutes the telephone number of the end-user
4 customer's telephone line. Based on this format and the known geographic local calling
5 area/EAS boundaries, a call may be determined to be either local or long distance.

6 **The Pac-West Complaint**

7 6. Pac-West's Complaint presents an important issue to this Commission.
8 Has the FCC changed the definition of a long distance call? In other words, when a
9 person places a long distance call to a computer, or Internet Service Provider ("ISP")
10 server ("ISP Server"), may the carrier connecting the call to the computer treat the call as
11 a local call according to the FCC's *ISP Remand Order*¹ for compensation and access
12 charge purposes? The answer is clearly no. However, Pac-West claims that a call to an
13 ISP Server, at least when the ISP Server is used to connect to the Internet, is, according to
14 the *ISP Remand Order*, to be treated as a local call under the process described in that
15 order, *no matter where the ISP Server is physically located*.

16 7. Pac-West's position is that for a call originating from Tucson, the called
17 ISP Server could be physically located in Phoenix, Los Angeles, or Albuquerque, and all
18 calls to the ISP Server (and through the ISP Server to the Internet) would be treated for
19 compensation purposes as a local call whereby both the caller and the ISP Server would
20 appear to be physically located in Tucson. This is also referred to as VNXX.² This is

21
22 ¹ See *In the Matter of Implementation of the Local Competition Provisions in the*
23 *Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic,*
24 *Order on Remand and Report and Order*, 16 FCC Rcd 9151, 9163-9181, ¶¶ 23-65, 9186-
25 9190, ¶¶ 77-84 (2001), *remanded sub nom, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C.
Cir. 2002), *reh'g en banc denied* (D.C. Cir., Sept. 24, 2002), *cert. denied*, 538 U.S. 1012
(May 5, 2003) ("*ISP Remand Order*").

26 ² "Virtual NXX" or "VNXX," the subject of this case, is a vehicle by which a carrier
27 obtains a telephone number for one local calling area and uses that telephone number in
28 another geographic area. Using a VNXX scheme thereby makes it appear, based on the
telephone number, that a call is a local call when, in fact, it is an interexchange or toll
(long distance) call (often being transported very long distances).

1 clearly not the law, and the FCC for more than 20 years has made it clear that a call to a
2 computer (including a call to an ISP Server used to provide information or enhanced
3 services) is to be rated based on the *physical location* of the ISP Server itself, and not the
4 location of any further end point with which the ISP Server may communicate, or to
5 which the computer may direct the call. Pac-West's argument is that the FCC somehow
6 accidentally reversed this consistent precedent, and thus that the FCC has ruled that *all*
7 calls to an ISP Server are to be treated according to the scheme in the *ISP Remand Order*,
8 no matter where the ISP Server is physically located.

9 8. This issue is important to Pac-West because if its position were to be
10 accepted, Pac-West would be able to reap significant financial advantages at the expense
11 of Qwest and the public. Not only would customers calling Pac-West's ISP customers
12 avoid paying toll charges for such calls, but also Qwest would be required (after an
13 amendment to the parties' interconnection agreement) to compensate Pac-West for
14 "terminating" the calls at the intercarrier compensation rate set forth in the FCC's *ISP*
15 *Remand Order* (\$0.0007 per minute) for "ISP-bound traffic."

16 9. Pac-West's position is directly contrary to FCC precedent, which requires
17 that a computer (such as an ISP Server) be treated exactly the same as other end-user
18 customers in determining whether a call to the computer is treated as a toll call or a local
19 call. In other words, a call originating from one local calling area to an ISP Server
20 physically located in another local calling area is treated as a toll call. This is the basis
21 for the so-called "ESP Exemption," which requires exactly that.

22 10. The federal ESP Exemption prevents a local exchange carrier from
23 charging switched access charges for a call made to a local computer on the basis that the
24 computer ultimately directs the call to an end point (e.g., another computer) or to another
25 station located in another state. This is part of the same rule that held that calls to or from
26 local Private Branch Exchanges ("PBXs") would not be required to pay switched access
27 charges, even if the calls were connected to another line and ultimately transferred to a
28 distant location. The ESP Exemption never said, explicitly or implicitly, that calls to or

1 from computers (or PBXs) were "local calls" no matter where the computers (or PBXs)
2 were physically located. Pac-West, however, argues that the FCC, without analysis or
3 even intent, has accidentally changed the entire landscape of access charges, and thus
4 issued a blanket exemption for all calls to and from all computers, no matter where
5 physically located (as long as they ultimately send the call to the Internet). Pac-West's
6 position that the FCC has made such a major policy shift is completely unsupported.
7 Further, any suggestion that based on the *ISP Remand Order*, the FCC intended for
8 VNXX calls to ISPs to be "local" is tantamount to claiming that the FCC has claimed
9 regulatory authority over that part of intrastate long distance, and thus intended that 1+
10 calls to ISPs be deemed "local," which would be completely without merit. This
11 Commission retains regulatory authority over intrastate calling; the FCC's *ISP Remand*
12 *Order* did nothing to change that.

13 11. Pac-West also ignores applicable Arizona administrative rules and
14 definitions and this Commission's recent ruling in the AT&T/Qwest arbitration
15 proceeding (Docket Nos. T-02428A-03-0553 and T-01051B-03-0553) dealing with the
16 definition of a "local" call. In that arbitration, the Commission ruled that the definition of
17 local exchange service would remain as traffic that originates and terminates within the
18 *same* Commission-determined local calling area.³ Thus, the Commission rejected
19 AT&T's request for a definition "based upon the NPA-NXX of the calling and called
20 parties" instead of the physical location of the parties, *i.e.*, Virtual NXX (or VNXX).
21 Therefore, a CLEC's VNXX offerings that do not provide for toll payments, or an
22

23 ³ Pac-West's interconnection agreement has a similar definition of "Exchange Service" to
24 that in the AT&T agreement. Specifically, the definition in the AT&T agreement (§ 4.0)
25 is as follows: "'Exchange Service' or 'Extended Area Service (EAS)/Local Traffic' means
26 traffic that is *originated and terminated within the same Local Calling Area as determined*
27 *for Qwest by the Commission.*" (Emphasis added.) The definition in Pac-West's
28 agreement (Part A, Definitions, p. 5) is as follows: "'Extended Area Service' ('EAS') is
intraLATA traffic treated as 'local' traffic between exchanges (rather than as 'toll' traffic)
as established by the Commission and as reflected in the effective U S WEST tariffs." See
Exhibit A to this Answer and Counterclaims (emphasis added).

1 appropriate substitute, or that seek reciprocal compensation or any other intercarrier
2 compensation, are improper.

3 12. Pac-West also ignores the plain language of the parties' interconnection
4 agreement ("ICA") regarding the types of traffic that the parties have agreed to exchange.
5 A true and correct copy of relevant portions of the Pac-West/Qwest ICA is attached
6 hereto as Exhibit A to this Answer and Counterclaims. The traffic types that the parties
7 have agreed to exchange over the local interconnection trunks and through the ICA
8 Single Point of Presence ("SPOP") amendment are very specifically delineated in the
9 ICA. As discussed below, the traffic for which Qwest disputes payment does not match
10 the traffic types the parties agreed to exchange under the ICA. Due to Pac-West's
11 purposeful misuse and improper assignment of telephone numbers, the traffic Pac-West
12 expects Qwest to exchange does not match any of the specifically defined traffic types,
13 and therefore is not traffic that the parties have agreed to exchange under the ICA. The
14 solution to this dispute is quite simple: if Pac-West assigns telephone numbers based on
15 the actual physical location of the ISP Server, then the traffic will be properly routed
16 consistent with the definitions in the ICA.

17 13. Indeed, Pac-West's misassignment of telephone numbers is not consistent
18 with the telecommunications industry's numbering resource guidelines. For example, the
19 Alliance for Telecommunications Industry Solutions ("ATIS") Central Office Code
20 (NXX) Assignment Guidelines ("COCAG") (Section 2.14) assumes "from a wireline
21 perspective that CO [central office] codes/blocks allocated to a wireline service provider
22 are to be utilized to provide service to a customer's premise *physically located* in the
23 same rate center that the CO codes/blocks are assigned." (Emphasis added.) Although
24 exceptions exist, such as for tariffed services like foreign exchange services, VNXX is
25 not such an exception. In addition, Section 4.2.2(6) of the COCAG provides that "[t]he
26 numbers assigned to the facilities identified must serve subscribers in the *geographic*
27 *area corresponding with the rate center requested.*" (Emphasis added.) Finally,
28 "geographic NPAs" are the "NPAs which correspond to discrete geographic areas within

1 the NANP [North American Numbering Plan],” while “non-geographic NPAs” are
2 “NPAs that do not correspond to discrete geographic areas, but which are instead
3 assigned for services with attributes, functionalities, or requirements that transcend
4 specific geographic boundaries,” “the common examples [of which] are NPAs in the N00
5 format, e.g., 800.” COCAG, § 13.0 (definition of “NPA,” p. 48). A true and correct
6 copy of relevant portions of the COCAG is attached hereto as Exhibit B to this Answer
7 and Counterclaims.

8 14. The solution to this dispute is quite simple. If Pac-West assigns telephone
9 numbers based on the actual physical location of the ISP Server, the traffic will be
10 properly routed consistent with the definitions in the ICA.

11 15. This case raises an important issue from a policy and financial perspective.
12 Ultimately, this Commission should rule in favor of Qwest and thus determine that
13 Pac-West is not entitled to unilaterally change the ICA. The Commission should further
14 rule (as a matter of federal law, state law and sound public policy) that Pac-West is not
15 entitled to shift the fundamental toll compensation structure in this state.

16 STATEMENT OF PERTINENT FACTS

17 Background of Dispute

18 16. This dispute arises because Pac-West has engaged in the practice of
19 providing a service to its ISP customers that enables the ISP’s customers who are
20 physically located in a particular local calling area to dial a “local” telephone number to
21 reach the ISP, even though the ISP is physically located in a different local calling area or
22 possibly even a different state. Pac-West does this by assigning telephone numbers to
23 Pac-West’s ISP customers based on where the call originates, thus allowing the calls to
24 terminate in a different local calling area. Pac-West then knowingly misuses Qwest’s
25 Local Interconnection Service (“LIS”) so that Qwest will believe it is obligated to route
26 and transport calls to Pac-West disguised as “local” calls (or, as Pac-West would try to
27 define them, “ISP-Bound” calls) when, in fact, the calls should be treated as *toll* calls.
28 While Pac-West seeks this treatment of ISP calls, other carriers seek the same treatment

1 of intercity calls not destined for the Internet. For example, some carriers' VNXX calls
2 might be destined for an inbound telemarketing center, a "help desk," or a voice
3 messaging system.

4 17. This practice has widespread and significant implications for the entire
5 access compensation system established in Arizona and elsewhere. Pac-West seeks to
6 benefit not once, but twice. Pac-West not only wants to allow its ISP customer and the
7 ISP's customers to avoid paying toll charges for long distance calls, but also seeks to
8 force ILECs like Qwest to pay Pac-West for the privilege of routing and transporting toll
9 calls for Pac-West. Such an approach would lead to severe financial repercussions for
10 the industry, would erode the financial support that originating access provides to local
11 rates, and would further distort the compensation scheme (including universal service
12 funding) underlying the public switched telephone network.

13 18. Pac-West's practices raise a wide variety of policy issues. Those issues are
14 being addressed and litigated before the FCC and the courts. Nonetheless, while those
15 proceedings are pending, Pac-West seeks to sidestep them by charging Qwest without
16 satisfying the change of law process provided for in the ICA. Pac-West's effort is not
17 supported by state law, federal law or the parties' ICA; and thus the Commission should
18 order that Pac-West cease such practices while the issues are sorted out. Because of the
19 status of the law, Qwest has refused to pay Pac-West's improper and inaccurate
20 intercarrier compensation bills for VNXX traffic.

21 19. Thus, the primary issue raised here is whether or not a call destined for the
22 ISP Server should be subject to the FCC's *ISP Remand Order* rate of \$0.0007 per minute,
23 regardless of the physical location of the person placing the call compared to the physical
24 location of the ISP Server. The FCC has addressed this issue. This Commission has also
25 recently issued a decision regarding the definition of a local call. All of this precedent
26 dictates that Pac-West is wrong.

1 Treatment of Calls Destined for ISPs

2 Federal Authority

3 20. The FCC has a long history of determining the appropriate compensation
4 treatment of traffic destined for "enhanced service providers" or "ESPs" (*i.e.*, providers
5 of communications that modify content). In 1983, the FCC issued an order creating the
6 so-called "ESP Exemption."⁴ The ESP Exemption was not really an exemption, but
7 rather a decision, based on a number of policy considerations, that enhanced service
8 providers were entitled to connect their points of presence through tariffed local retail
9 services (rather than through tariffed feature group access services that interexchange
10 carriers were required to purchase), even though the facilities were really being used for
11 services classified as interstate.⁵ The FCC assigned the same status to private
12 telecommunications networks or systems (*e.g.*, PBX systems) that accessed local
13 exchange systems for connecting interstate calls.⁶ In other words, the FCC treated the
14 point of presence of an enhanced service provider as if that point of presence were the
15 location of a retail customer.

16 21. The FCC applied the same approach under the 1996 Telecommunications
17 Act (the "Act") when it addressed traffic routed to the Internet. The FCC determined that
18 ISPs, the heirs to the old "enhanced service provider" designation, were entitled to the

19
20 ⁴ See *In the Matter of MTS and WATS Market Structure*, Third Report and Order, 93 FCC
21 2d 241, 254-255, ¶ 9 and fn. 15, 320, ¶ 269 (1983); *modified on recon.*, 97 FCC 2d 682
22 (1984) ("First Order on Reconsideration"), *further modified on recon.*, 97 FCC 2d 834
23 (1984) ("Order on Further Reconsideration"), *aff'd in principal part and remanded in*
part sub nom., *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S.
1227 (1985).

24 ⁵ See, *e.g.*, *In the Matter of Access Charge Reform, Price Cap Performance Review for*
25 *Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line*
26 *Charges*, First Report and Order, 12 FCC Rcd 15982, 16131-34, ¶¶ 341-48 (1997); *see*
also, generally, In the Matter of Amendments of Part 69 of the Commission's Rules
Relating to Enhanced Service Providers, Order, 3 FCC Rcd 2631 (1988).

27 ⁶ See *In the Matter of WATS-Related and Other Amendments of Part 69 of the*
28 *Commission's Rules*, Memorandum Opinion and Order, 2 FCC Rcd 7424, 7425, ¶¶ 13-15
(1987).

1 same treatment for compensation purposes. Thus, when an ISP is served by a CLEC, the
2 same analysis applies under Section 251(g) of the Act. The ISP Server is treated as an
3 end-user location for purposes of compensation, but the call does not terminate at this
4 location. The ISP may purchase services from its telecommunications provider for the
5 purpose of getting its incoming calls to the ISP Server. Compensation between the ISP's
6 provider (Pac-West) and the LEC (Qwest) that serves the customer that originated the
7 call is based on the geographic location of the two ends of the call.⁷

8 22. In March of this year, the FCC issued its Notice of Further Proposed
9 Rulemaking in its *Intercarrier Compensation* docket to consider these issues as a part of
10 an overall examination of intercarrier compensation.⁸ Nevertheless, as of today, the
11 applicable law has not changed. The ISP Server should be considered a retail location for
12 the purposes of appropriate number assignment and determining intercarrier
13 compensation.⁹

14 23. Pac-West ignores this regulatory history by attempting to charge Qwest at
15 the *ISP Remand Order* \$0.0007 per minute rate for terminating such VNXX traffic.
16 Pac-West has argued in other jurisdictions that the FCC's *ISP Remand Order* and a recent
17 FCC decision related to a forbearance petition by Core Communications fundamentally
18
19

20 ⁷ See *In the Matter of Implementation of the Local Competition Provisions in the*
21 *Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic,*
22 *Order on Remand and Report and Order*, 16 FCC Rcd 9151, 9163-81 ¶¶ 23-5, 9186-90,
23 ¶¶ 77-4 (2001), *remanded sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir.
2002), *reh'g, en banc, denied* (D.C. Cir. Sept. 24, 2002), *cert. denied*, 538 U.S. 1012
(May 5, 2003).

24 ⁸ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further
25 Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (rel. Mar. 3, 2005) ("Further
26 Notice").

27 ⁹ For a more detailed analysis of these legal issues, see the *Ex Parte Comments* that
28 Qwest filed with the FCC on March 11, 2005 in response to a forbearance petition
brought by Level 3 regarding these issues, which is attached as Exhibit C to this Answer
and Counterclaim.

1 change this analysis.¹⁰ Pac-West argues that *all* traffic destined for the Internet must be
2 treated as subject to the FCC *ISP Remand Order* \$0.0007 per minute rate, regardless of
3 whether such traffic originated from next door, across the state, or even across the
4 country. Its position is simply wrong, and is in violation of the FCC's rules (*i.e.*, the FCC
5 ESP Exemption rule), and essentially has the effect of asserting that the FCC somehow
6 intended to preempt states on the regulation of intrastate traffic.

7 24. In fact, if Pac-West delivered traffic to its ISP customer's server physically
8 located in the *same local calling area* as where the call originated, Pac-West would be
9 correct that under existing rules, the call would be treated as subject to the *ISP Remand*
10 *Order* \$0.0007 per minute rate.¹¹ However, Pac-West's ISP customer's equipment is *not*
11 physically located in the same local calling area as the individual and business customers
12 that call Pac-West's ISP customers. Thus, Pac-West seeks to collect compensation to
13 which it is not entitled.

14 25. Pac-West's approach ignores long-standing FCC precedent, as well as the
15 guidance of a recent Commission decision on these issues. In describing ISP-bound
16 traffic in the background section of the order, the FCC states that "*an ISP's end-user*
17 *customers typically access the Internet through an ISP Server located in the same local*
18 *calling area,*" and that the end-user customers pay the local exchange carrier for
19 connections to the "local ISP." *ISP Remand Order*, ¶ 10. The FCC defines ISPs as "one
20 set of enhanced service providers." *Id.*, ¶ 11 (emphasis added). The FCC specifically
21 identified the issue that it was addressing as "whether reciprocal compensation
22 obligations apply to the delivery of calls from *one LEC's end-user customer to an ISP in*
23 *the same local calling area* that is served by a competing LEC." *Id.*, ¶ 13 (emphasis
24 added). Thus, in examining ISP traffic, the *ISP Remand Order* did not address the

25
26 ¹⁰ See *Petition of Core Communications for Forbearance under 47 USC § 160(c) from*
27 *the Application of the ISP Remand Order*, Order FCC 04-241, WC Docket No. 03-171
28 (rel. October 18, 2004) ("*Core Forbearance Order*").

¹¹ Such a change would still require an ICA amendment.

1 situation where a CLEC customer's ISP server is physically located *outside* of the local
2 calling area of both its assigned telephone number(s) and the originating caller. In fact,
3 asserting that the *ISP Remand Order* somehow intended to address this scenario is an
4 implicit claim of FCC preemption of a portion of the intrastate market, an argument for
5 which there is no basis.

6 26. Similarly, the *Core Forbearance Order* addressed the application of the
7 *ISP Remand Order*. It addressed whether certain provisions in the *ISP Remand Order*
8 should continue to apply to CLECs serving ISPs. Because the *ISP Remand Order* did not
9 address the treatment of calls from one local calling area to an ISP with equipment in
10 *another* local calling area, the *Core Forbearance Order* did not address the issue either.

11 27. Qwest's position of the FCC's actions gains support from the appeal of the
12 *ISP Remand Order*. *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *reh'g en*
13 *banc denied* (D.C. Cir., Sept. 24, 2002), *cert. denied*, 538 U.S. 1012 (May 5, 2003). In
14 *WorldCom*, the court unequivocally stated that the FCC's *ISP Remand Order* addressed
15 calls made to ISPs physically located *within* the *same* local calling area as the originating
16 caller. *WorldCom*, 288 F.3d at 430. Thus, there is a lack of support for the interpretation
17 that Pac-West advocates that the FCC, in the *ISP Remand Order*, somehow summarily
18 changed the long history of determining the appropriate treatment of traffic destined for
19 enhanced service providers. In fact, in a similar proceeding before the Public Utility
20 Commission of Oregon, an Administrative Law Judge agreed with Qwest ruling that
21 ISP-Bound traffic as used in the *ISP Remand Order* does not include VNXX traffic.¹²

22 State Authority

23 28. The Commission has provided strong guidance on this issue in that it
24 recently addressed a dispute about how to define a "local call." Specifically, in the
25 AT&T/Qwest arbitration, Qwest and AT&T disputed the appropriate definition of a local
26

27 ¹² See *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC*, Docket IC
28 12, Ruling (issued Aug. 16., 2005), which is attached as Exhibit D to this Answer and
Counterclaim.

1 call under Arizona law. The Commission agreed with Qwest's position that a "local call"
2 is one "that is originated and terminated within the same local calling area as determined
3 for Qwest by the Commission." The Commission rejected AT&T's proposal to define a
4 local call by reference to "the calling and called NPA/NXXs" (*i.e.*, VNXX). *See* Opinion
5 and Order, Decision No. 66888, Docket Nos. T-02428A-03-0553 and T-01051B-03-0553
6 (April 6, 2004), p. 13.

7 29. In that arbitration, the Commission found that Qwest's proposed definition
8 of "Exchange Service" comported with existing Arizona law and rules and thus should be
9 adopted, while AT&T's proposed definition "represent[ed] a *departure from the*
10 *establishment of local calling areas* and may have an *unintended affect* beyond the issues
11 discussed and be *subject to abuse*." Decision No. 66888, p. 13 (emphasis added). Said
12 the Commission: "We do not believe that it would be good public policy to alter long-
13 standing rules or practice without broader industry and public participation. *Id.*¹³

14 30. Moreover, the pertinent rules and definitions in the Arizona Administrative
15 Code that are at issue here are as follows:

16 'Central Office Code' means the first three digits of a seven-
17 digit telephone number. Central office codes are assigned to
18 telecommunications providers by the central office code
19 administrator in accordance with the industry's central office
20 assignment guidelines.

21 A.A.C. R14-2-1302(4).¹⁴

22 'Extended Area Service' or 'EAS' means local (toll-free)
23 calling provided between local exchange carrier exchanges
24 (service areas).

25 A.A.C. R14-2-1302(9).

26 ¹³ As stated *infra* (fn. 4), Pac-West's interconnection agreement has a similar definition
27 of "Exchange Service" or "EAS" as that which is in the AT&T agreement.

28 ¹⁴ See Paragraph 13 for a discussion of the telecommunications industry's central office
assignment guidelines.

1 'Local Exchange Service.' Telecommunications service that
2 provides a local dial tone, access line, and local usage *within*
3 *an exchange or local calling area.*

4 A.A.C. R14-2-1102(8).

5 'Local and Toll Rating Centers.'

6 The incumbent LEC's local calling areas and existing EAS
7 boundaries will be utilized for the purpose of classifying
8 traffic as local, EAS, or toll for purposes of intercompany
9 compensation.

10 All LECs will use central office codes with rate centers
11 matching the incumbent LEC's rate centers.

12 A.A.C. R14-2-1305.

13 'Rate Center' means specific *geographic locations* from
14 which airline mileage measurements are determined for the
15 purposes of *rating local, Extended Area Service (EAS), and*
16 *toll traffic.*

17 A.A.C. R14-2-1302(19).

18 'Reciprocal Compensation' means the arrangement by which
19 local exchange carriers compensate each other for *like*
20 *services* used in the *termination of local calls* between the
21 customers of the two carriers.

22 A.A.C. R14-2-1302(20).

23 'Toll service.' Service between stations in *different exchange*
24 *areas* for which a long distance charge is applicable.

25 A.A.C. R14-2-501(23). (Emphasis added throughout.)

26 The same analysis applies in this case. For example, the Pac-West ICA provides:
27 "Extended Area Service" ("EAS") is intraLATA traffic *treated as "local" traffic between*
28 *exchanges (rather than as "toll" traffic)* as established by the Commission and as
reflected in the effective U S WEST tariffs. Ex. A, Part A, Definitions, p. 5 (emphasis
added).

31. Although Pac-West will undoubtedly attempt to distinguish this precedent
(such as, for example, by arguing that the traffic at issue is bound for the Internet, and
thus that it is somehow exempt from these Arizona definitions), the fact is that Arizona
law makes no such distinction. Nor has the FCC made such a distinction. If VNXX

1 traffic is allowed to flow between carriers, it should not be treated as "local" traffic under
2 the parties' ICA.

3 **Treatment of ISP Traffic under the ICA**

4 32. Further still, Pac-West's conduct violates the parties' ICA. The ISP
5 Amendment that Pac-West and Qwest executed and that Pac-West refers to in its
6 complaint describes "ISP-Bound traffic" "as that term is used in the FCC ISP Order" [the
7 FCC's "Order on Remand and Report and Order in CC Docket 99-68 (Inter-carrier
8 Compensation for ISP-Bound Traffic)"] (*i.e., the ISP Remand Order*). A true and correct
9 copy of the ISP Amendment to the Pac-West/Qwest ICA is attached hereto as Exhibit E
10 to this Answer and Counterclaims. (*See* Ex. E, § 3, and second Recital.)¹⁵ As discussed
11 above, the *ISP Remand Order* did not accidentally include traffic destined for an ISP
12 Server physically located in a different local calling area than the originating caller as
13 part of the "ISP-Bound traffic" addressed in the order. Thus, the traffic is not "ISP-
14 Bound" as discussed or defined in the ISP Amendment.

15 33. Pac-West, however, seeks to sweep aside these definitions by assuming that
16 traffic destined for the Internet automatically falls within the definition of "ISP-bound
17 traffic," regardless of where the traffic physically originates and terminates. Indeed,
18 Pac-West ignores the FCC history of defining traffic destined for an ISP as traffic that
19 travels solely *within* a local calling area prior to being delivered to the ISP Server.
20 Pac-West also ignores long-standing industry practice of treating calls dialed as 1+ calls
21 to the Internet as being toll calls. Pac-West then hides this practice by improperly
22 assigning local numbers (through its VNXX schemes).

23 **VNXX Traffic over LIS Trunks**

24 34. Pac-West has argued that the parties have agreed to exchange VNXX traffic
25 over LIS trunks. Qwest disagrees. Section 17.3 of the parties' ICA and the parties'

26 _____
27 ¹⁵ The parties' ISP Amendment was filed with the Commission on or about February 18,
28 2003. The amendment became effective by operation of law on May 19, 2003. Decision
No. 66052, Docket No. T-01051B-03-0107, T-03693A-03-0107.

1 SPOP amendment specifically delineate the types of traffic that are to be exchanged
2 under the ICA. (See Ex. A, § 17.3; SPOP Amendment, Attachment 1, § 1.) With respect
3 to the traffic and disputes at issue in this matter, there are three relevant types of traffic
4 which are appropriately exchanged under the agreement and under the parties' SPOP
5 amendment to the ICA: (1) Exchange Service EAS/Local traffic, (2) Exchange Access
6 (IntraLATA Toll Non-IXC) traffic and (3) Jointly Provided Switched Access (InterLATA
7 and InterLATA IXC) traffic. A true and correct copy of the SPOP Amendment to the
8 Pac-West/Qwest ICA is attached hereto as Exhibit F to this Answer and Counterclaims.
9 (See, e.g., Ex. F, Attachment 1, § 1)¹⁶

10 35. The ICA (Ex. A) defines those categories of traffic as follows:

11 "Extended Area Service" ("EAS") is intraLATA traffic
12 treated as "local" traffic between exchanges (rather than as
13 "toll" traffic) *as established by the Commission and as
reflected in the effective U S WEST tariffs.*

14 Ex. A, Part A, Definitions, p. 5.

15 "Toll Traffic" is traffic that *originates in one Rate Center and*
16 *terminates in another Rate Center* with the exception of traffic
that is rated as EAS.

17 *Id.*, p. 11.

18 "Access Services" refers to interstate and intrastate switched
19 access and private line transport services.

20 *Id.*, p. 2.

21 "Meet-Point Billing" or "MPB" refers to an arrangement
22 whereby two LECs (including a LEC and Pac-West) jointly
23 provide Switched Access Service to an Interexchange Carrier,
with each LEC (or Pac-West) receiving an appropriate share of
the access element revenues.

24 *Id.*, p. 7.

25
26 ¹⁶ The parties entered into the SPOP Amendment in January 2001 and it was filed with
27 the Commission on or about April 27, 2001. The amendment became effective by order
28 of the Commission on June 6, 2005. See Decision No. 63736, Docket No.
T-01051B-01-0357, T-03693A-01-0357.

1 "Switched Access", "Switched Access Service", "Switched Exchange
2 Access Service" or "Switched Access Traffic" are *as defined in the Parties'*
3 *applicable tariffs.*

4 *Id.*, p. 10. (Emphasis added throughout.)

5 36. As stated, the term "ISP-Bound" is defined by the ISP Amendment (Ex. E,
6 § 1.4) "as described by the FCC in its Order on Remand and Report and Order
7 (Intercarrier Compensation for ISP-Bound traffic) CC Docket 96-98." As already
8 discussed above, Pac-West's contention that the traffic at issue is entitled to treatment
9 and compensation according to the *ISP Remand Order* is incorrect and not an appropriate
10 reading of that order, and conflicts with the Commission's definition of local traffic in
11 Docket Nos. T-02428A-03-0553 and T-01051B-03-0553.

12 37. It is possible that Pac-West may claim, as some other carriers have
13 attempted to claim, that this traffic is "Extended Area Service" ("EAS") traffic,
14 commonly referred to as "EAS/Local traffic." This traffic is defined in Part A, p. 5 of the
15 ICA as "intraLATA traffic treated as "local" traffic between exchanges (rather than as
16 "toll" traffic) *as established by the Commission* and *as reflected in the effective*
17 *US WEST tariffs.*" (Ex. A, Part A, p. 5 (emphasis added).) Even a cursory examination
18 of the traffic at issue, however, shows that it does not meet this definition. Pac-West
19 does not deny that it forces Qwest to exchange traffic that is not terminated at the ISP
20 Server in the same local calling area as the originating caller (identical to VNXX traffic);
21 but Pac-West has nevertheless claimed that it is "ISP-bound" traffic. Thus, there should
22 be no contention as to whether the VNXX traffic at issue is "Exchange Service" traffic.

23 38. A traffic type that *may superficially appear* to functionally apply to the
24 VNXX traffic at issue is under the definition of "Switched Access", "Switched Access
25 Service", "Switched Exchange Access Service" or "Switched Access Traffic," which are
26 all defined in Pac-West's ICA "*as defined in the Parties' applicable tariffs.*" (Ex. A, Part
27 A, p. 10 (emphasis added).) While this may appear functionally appropriate, upon closer
28 examination the traffic does not meet this definition either.

1 39. As a threshold matter, only Pac-West knows the exact location of the
2 end-user ISP Server or modem bank for this traffic. Thus, Qwest cannot completely
3 determine for any given call whether the call is destined for a location within the local
4 calling area or in a different local calling area. Qwest only knows how far it carried the
5 call before handoff to the interconnected carrier, where that carrier's serving switch is
6 located, and whether traffic is one-way or two-way. In addition, even for that traffic
7 which may functionally appear to match the definition, Pac-West's purposeful misuse
8 and misassignment of telephone numbers makes it difficult to track such traffic.
9 Pac-West clearly does not intend for the traffic to be treated as "Exchange Access" traffic
10 under the ICA, as evidenced by its misuse of telephone numbers. Thus, it is apparent this
11 definition does not match the traffic either.

12 40. Finally, the last possible traffic type, "Meet-Point Billing," does not match
13 up at all to the VNXX traffic at issue. (Ex. A, Part A, p. 7.) This is so because no IXC is
14 involved, as only Pac-West and Qwest are involved in the carriage of the traffic, which is
15 contrary to the definition of the traffic in Part A, p. 7 of the ICA.

16 41. Therefore, in reviewing the ICA's plain language and the VNXX traffic
17 that Pac-West causes Qwest to exchange, none of the traffic types that the parties
18 specifically agreed to exchange match this VNXX traffic. Since Pac-West can easily
19 remedy the situation by properly assigning telephone numbers based on the actual
20 location of its end-user customers, it is incumbent upon Pac-West to ensure that the
21 exchange of traffic under the ICA follows the terms and conditions of that agreement. In
22 the end, Pac-West is simply attempting to exchange traffic that the parties never agreed to
23 exchange under the terms of the ICA.

24 RESPONSE TO ALLEGATIONS IN THE COMPLAINT

25 42. Unless specifically admitted in this section, Qwest denies each and every
26 allegation in Pac-West's Complaint. Qwest's factual assertions and legal argument
27 contained in the preceding sections of this Answer are incorporated into and should be
28 considered a part of these responses to the individual allegations of the Complaint.

1 **PARTIES**

2 43. Qwest neither admits nor denies the allegations in Paragraph 1 of the
3 Complaint regarding Pac-West's business, its operations in Arizona or its corporate
4 headquarters. For example, Qwest does not know the extent to which Pac-West has been
5 authorized by the Commission to provide service in Arizona.

6 44. Qwest admits the allegations in Paragraph 2 regarding Qwest's business
7 and its operations in Arizona.

8 **JURISDICTION**

9 45. Qwest admits the allegations in Paragraph 3 that this Commission has the
10 authority to enforce Qwest's ICA with Pac-West. Qwest denies, however, that the
11 Commission has jurisdiction to award equitable or monetary relief to the extent that
12 Pac-West's Complaint seeks such relief. Qwest further denies that the ICA supports the
13 relief that Pac-West is seeking.

14 **RESPONSE TO STATEMENT OF LAW AND FACTS**
15 **COMMON TO ALL COUNTS**

16 46. Qwest admits the allegations in Paragraph 4 of the Complaint regarding the
17 ICA.

18 47. Qwest admits the allegations in Paragraph 5 of the Complaint regarding the
19 ISP Amendment to the ICA.

20 48. Qwest states that the averments in Paragraph 6 of the Complaint constitute
21 conclusions of law, and as such do not contain allegations which Qwest must admit or
22 deny. To the extent that these averments constitute statements of fact, Qwest states that
23 the FCC's *ISP Remand Order* and the ISP Amendment of the parties' ICA speak for
24 themselves.

25 49. Qwest states that the averments in Paragraph 7 of the Complaint constitute
26 conclusions of law, and as such do not contain allegations which Qwest must admit or
27 deny. To the extent that these averments constitute statements of fact, Qwest states that
28 the FCC's *ISP Remand Order* speaks for itself.

1 50. Qwest admits the allegations in Paragraph 8 of the Complaint that Pac-West
2 has billed Qwest, and Qwest has paid Pac-West, for the appropriate portions of the
3 appropriate terminating local and ISP-bound traffic since the ICA became effective, in
4 accordance with the parties' ICA and in compliance with the terms of the FCC's *ISP*
5 *Remand Order*. Qwest further admits that in early 2004, in compliance with the ICA and
6 terms of the FCC's *ISP Remand Order*, Qwest started withholding payment on
7 Pac-West's invoices for compensation on the grounds that Pac-West had exceeded the
8 minutes of use growth ceiling terms for ISP traffic described in Section 3.2.2 of the ISP
9 Amendment. Qwest further admits that after following the ICA's dispute resolution
10 provisions, Pac-West and Qwest agreed to a private arbitration to resolve this issue (AAA
11 Case #77Y181-00385-02 (JAG Case No. 221368)). Qwest further admits that during the
12 pendency of the arbitration, the FCC released the *Core Forbearance Order*, but otherwise
13 states that both the *Core Forbearance Order* and the December 2, 2004 Arbitrator's
14 decision speak for themselves. Finally, although Qwest did not agree with the
15 Arbitrator's December 2, 2004 decision, Qwest admits it did not choose to appeal the
16 Arbitrator's decision under the terms of appeal in the rules of arbitration governing that
17 decision, and further denies that the Arbitrator's order requires Qwest to pay Pac-West the
18 alleged "full amount it had withheld."

19 51. Qwest admits the allegations in Paragraph 9 of the Complaint that on
20 December 29, 2004, Qwest officially notified Pac-West that Qwest intended to withhold
21 compensation for VNXX traffic retroactive to the beginning of 2004, but denies
22 Pac-West's characterization of how Qwest defines VNXX or Virtual NXX, and further,
23 denies that VNXX, a commonly-used term in the telecom industry, is "Qwest's term for
24 traditional Foreign Exchange service when that service is provided by Pac-West," as there
25 are many key distinguishing differences. Qwest further denies that Qwest has "contrived
26 a new basis for withholding competition owed Pac-West pursuant to the arbitrator's order
27 for the exchange of local exchange traffic," especially because the Arbitrator's order did
28

1 not address VNXX, and VNXX is not "local exchange traffic."¹⁷ Qwest further states that
2 on January 25, 2005, Qwest issued formal dispute letters to all CLECs across its region
3 that it suspected of engaging in the wrongful exchange of VNXX traffic, and that Qwest
4 requested the commencement of formal dispute resolution procedures under the respective
5 ICAs. Finally, Qwest denies Pac-West's allegations about the compensation for traffic
6 that Pac-West has terminated. Qwest further denies the Pac-West claim that there is
7 approximately \$443,784.34 in compensation owed to Pac-West for local exchange traffic
8 terminated between January 1, 2004 and May 31, 2005. Rather, Qwest submits that the
9 maximum amount of the claim is approximately \$436,854.34, based on usage from
10 January 1, 2004 through May 31, 2005.

11 52. Qwest admits the allegations in Paragraph 10 of the Complaint that
12 Pac-West and Qwest have discussed these issues, but denies Pac-West's characterizations
13 that Qwest attempted to evade enforcement of the Arbitrator's order. Qwest further
14 admits that negotiations, while helpful in discussion, were unsuccessful. Qwest further
15 admits that it notified Pac-West in an April 27, 2005 letter that it would withhold 36.6%
16 of Pac-West's billed ISP minutes in Arizona in the second quarter of 2005, which
17 represented the amount of suspected VNXX traffic that is in dispute.

18 53. Qwest states that the averments in Paragraph 11 of the Complaint constitute
19 conclusions of law, and as such do not contain allegations which Qwest must admit or
20 deny. To the extent that these averments constitute statements of fact, Qwest denies that it
21 has refused to compensate Pac-West for local exchange traffic pursuant to the cost-

22 ¹⁷ Qwest's FX service is different from VNXX services. Qwest's FX service provides a
23 subscriber the ability to purchase *separate dedicated switching and transport facilities*
24 from each local calling area that the subscriber wishes to obtain a local presence. The
25 end-user customer pays for such facilities. VNXX, on the other hand, is merely a carrier's
26 misassignment of telephone numbering resources that were obtained under the auspices of
27 providing service within the local calling area for which they were obtained, but then
28 assigning these numbers to common switching and transport facilities that serve a
subscriber regardless of the physical location of the subscriber. VNXX services are
provided by carriers like Pac-West in attempts to arbitrage intercarrier compensation by
recovering compensation for calls that appear to be "local" but are in fact non-local.

1 recovery mechanism ordered by the FCC and agreed to by Pac-West and Qwest in the ISP
2 Amendment, or that Qwest has otherwise breached its agreement with Pac-West.

3 54. Qwest states that the averments in Paragraph 12 of the Complaint constitute
4 conclusions of law, and as such do not contain allegations which Qwest must admit or
5 deny. To the extent that these averments constitute statements of fact, Qwest admits that
6 Pac-West and Qwest have been exchanging traffic pursuant to the ICA since February
7 2001. Qwest denies, however, that it never contended that VNXX traffic is not subject to
8 compensation. Rather, Qwest states that from a compensation perspective, the impact of
9 VNXX traffic under the growth cap provisions of the FCC *ISP Remand Order* and the
10 parties' ICA was insignificant, and was effectively irrelevant to the billing by Pac-West to
11 Qwest. Qwest became more acutely aware that Pac-West was engaging in such VNXX
12 schemes by Pac-West's attempts to increase billing to Qwest for such schemes after the
13 removal of the cap provisions brought about by the December 2, 2004 Arbitrator's
14 decision and the FCC *Core Forbearance Order*. Qwest further denies that it is attempting
15 to "re-interpret" the ICA, or to preclude Pac-West from receiving compensation for
16 terminating "the very traffic for which Qwest has consistently compensated Pac-West for
17 years." To the contrary, Qwest avers that Pac-West is attempting to seek compensation
18 for the very traffic for which it had *not* received compensation in prior years. Finally,
19 Qwest denies that there has been any course of dealing or estoppel that would require
20 Qwest to compensate Pac-West for terminating "all locally-dialed" traffic, including
21 VNXX calls that happen to be bound for the Internet, or that the Commission should
22 require Qwest to compensate Pac-West for any traffic destined for an ISP that is VNXX
23 traffic.

24 55. Qwest states that the averments in Paragraph 13 of the Complaint constitute
25 conclusions of law, and as such do not contain allegations which Qwest must admit or
26 deny. To the extent that these averments constitute statements of fact, Qwest denies that it
27 has run afoul of its own practice, or that Qwest's FX services are similar to Pac-West's
28

1 VNXX services, or that it has discriminated or otherwise applied its inter-carrier
2 compensation position in a discriminatory manner.

3 56. Qwest states that the averments in Paragraph 14 of the Complaint constitute
4 conclusions of law, and as such do not contain allegations which Qwest must admit or
5 deny. To the extent that these averments constitute statements of fact, Qwest denies that
6 an arbitrator interpreted the ICA to require Qwest to compensate Pac-West for "all" traffic
7 that is destined for ISP equipment beginning January 1, 2004, and further states that the
8 Arbitrator's decision speaks for itself. Qwest further denies that less than one month after
9 the arbitrator rendered his decision, Qwest notified Pac-West of Qwest's intention to
10 withhold compensation for "the very same traffic in amounts comparable to the amounts
11 Qwest had previously withheld," and further states that the amounts that Qwest has
12 withheld are for traffic that was not the subject of the arbitration proceeding to which
13 Pac-West refers. Qwest further denies that Qwest is impermissibly attempting to evade
14 the Arbitrator's decision, or that it is manufacturing arguments that Qwest could have
15 made during the arbitration, or that it waited to raise these issues until just after the
16 conclusion of the arbitration. Qwest further states that the arbitration to which Pac-West
17 refers was clearly irrelevant to the issue here, and that the arbitration did not address the
18 VNXX-related issues in dispute in this proceeding. Finally, Qwest denies that it is
19 attempting to "hav[e] another bite at the same apple," or that the Commission should
20 require Qwest to compensate Pac-West for "all" traffic destined for ISP equipment, or any
21 ISP traffic that is VNXX traffic.

22 57. With respect to Pac-West's prayer for relief, Qwest states that the prayers do
23 not contain allegations to which Qwest must admit or deny. To the extent that these
24 prayers constitute statements of fact, Qwest denies them in their entirety. Qwest denies
25 that Pac-West is entitled to any relief whatsoever in connection with this proceeding, and
26 specifically denies the claims set forth in Paragraphs 15 through 18 of the Complaint.

1 COUNTERCLAIMS

2 58. Qwest brings these Counterclaims against Pac-West as a result of
3 Pac-West's violation of federal law, violations of state law, and breach of the terms and
4 conditions of the parties' interconnection agreement. These Counterclaims consist of four
5 counts, as follows:

6 COUNT 1

7 (Violation of Federal Law)

8 59. Qwest has set forth the applicable federal law regarding calls made to the
9 Internet.

10 60. Pac-West's knowing misassignment of local telephone numbers and
11 NPA/NXXs in local calling areas other than the local calling area where its customer's
12 ISP Server is physically located, its misuse of such telephone numbering resources, and its
13 subsequent attempts to bill Qwest the *ISP Remand Order* rate for such VNXX traffic, are
14 violations of federal law. The Commission should order Pac-West to cease assigning
15 NPA/NXXs in local calling areas other than the local calling area where its customer's
16 ISP Server is physically located, and cease charging Qwest for such traffic, and further,
17 should require that Pac-West properly assign telephone numbers based on the actual
18 physical location of its end-user or ISP customer.

19 COUNT 2

20 (Violation of State Law)

21 61. Qwest has set forth the applicable state law regarding the definition of a
22 local call and the proper compensation for calls made to the Internet using VNXX
23 schemes, including the Commission's recent order in Docket Nos. T-02428A-03-0553
24 and T-01051B-03-0553.

25 62. Pac-West's knowing misassignment of local telephone numbers and
26 NPA/NXXs in local calling areas other than the local calling area where its customer's
27 ISP Server is physically located, its misuse of such telephone numbering resources, and
28 its subsequent attempts to bill Qwest the *ISP Remand Order* rate for such VNXX traffic,

1 are violations of Arizona law. The Commission should order Pac-West to cease
2 assigning NPA/NXXs in local calling areas other than the local calling area where its
3 customer's ISP Server is physically located, and cease charging Qwest for such traffic,
4 and further, should require that Pac-West properly assign telephone numbers based on the
5 actual physical location of its end-user or ISP customer.

6 63. Qwest has set forth the applicable state law regarding the definition of a
7 local call and the proper compensation for calls made to the Internet using VNXX
8 schemes, including the Commission's recent order in Docket No. UT-033035.

9 64. Pac-West's knowing misassignment of local telephone numbers and
10 NPA/NXXs in local calling areas other than the local calling area where its customer's
11 ISP Server is physically located, its misuse of such telephone numbering resources, and its
12 subsequent attempts to bill Qwest the *ISP Remand Order* rate for such VNXX traffic, are
13 violations of Arizona law. The Commission should order Pac-West to cease assigning
14 NPA/NXXs in local calling areas other than the local calling area where its customer's
15 ISP Server is physically located, and cease charging Qwest for such traffic, and further,
16 should require that Pac-West properly assign telephone numbers based on the actual
17 physical location of its end-user or ISP customer.

18 COUNT 3

19 (Violation of Section 2.1.4.6 of the ICA)

20 65. Pac-West is knowingly misassigning local telephone numbers to ISP
21 Servers which are physically located outside the local area to which the telephone number
22 is assigned.

23 66. Section 2.1.4.6.8 of Attachment 5 to the ICA provides that "[e]ach Party is
24 responsible for administering NXX codes assigned to it." Further, it requires that "Each
25 party shall use the LERG published by Bellcore or its successor for obtaining routing
26 information and shall provide all required information to Bellcore for maintaining the
27 LERG in a timely manner." Through its actions described above, Pac-West is violating
28 these obligations. This Commission should issue an order finding Pac-West in breach of

1 its contractual obligations and further, should invalidate Pac-West's bills.

2 **COUNT 4**

3 **(Improper Routing of Traffic over LIS Trunks)**

4 67. Section 1 of Attachment A of the SPOP Amendment authorizes the parties
5 to exchange the following categories of traffic over LIS Trunks: (1) Exchange Service
6 EAS/Local traffic, (2) Exchange Access (IntraLATA Toll Non-IXC) traffic and (3) Jointly
7 Provided Switched Access (InterLATA and InterLATA IXC) traffic.

8 68. The ICA defines those categories of traffic as follows:

9 "Extended Area Service" ("EAS") is intraLATA traffic
10 treated as "local" traffic between exchanges (rather than as
11 "toll" traffic) *as established by the Commission and as
reflected in the effective U S WEST tariffs.*

12 Ex. A, Part A, Definitions, p. 5.

13 "Toll Traffic" is traffic that *originates in one Rate Center and*
14 *terminates in another Rate Center* with the exception of traffic
15 that is rated as EAS. (Emphasis added.)

16 *Id.*, p. 11.

17 "Access Services" refers to interstate and intrastate switched
18 access and private line transport services.

19 *Id.*, p. 2.

20 "Meet-Point Billing" or "MPB" refers to an arrangement
21 whereby two LECs (including a LEC and Pac-West) jointly
22 provide Switched Access Service to an Interexchange Carrier,
23 with each LEC (or Pac-West) receiving an appropriate share
24 of the access element revenues.

25 *Id.*, p. 7.

26 "Switched Access", "Switched Access Service", "Switched
27 Exchange Access Service" or "Switched Access Traffic" are *as*
28 *defined in the Parties' applicable tariffs.*

Id., p. 10. (Emphasis added throughout.)

69. "ISP-bound traffic" is as defined in the ISP Amendment (§ 1.4), which refers to the *ISP Remand Order*. VNXX traffic, even if it is destined for an ISP, does not fit in any of these categories.

70. Accordingly, Pac-West is violating its ICA by attempting to obligate Qwest to send non-local ISP traffic over LIS trunks. The Commission should order Pac-West to discontinue the practice of misassigning the telephone numbers and cease routing VNXX traffic over LIS trunks to Qwest, and further, should invalidate Pac-West's bills to Qwest.

RELIEF REQUESTED

WHEREFORE, Qwest respectfully requests the Commission provide the following relief:

A. Deny all of the relief requested by Pac-West in its Complaint;

B. Issue an order (1) prohibiting Pac-West from assigning NPA/NXXs in local calling areas other than the local calling area where the Pac-West customer has a physical presence, (2) requiring that Pac-West cease its misuse of such telephone numbering resources, and (3) requiring that Pac-West properly assign telephone numbers based on the location where its customer has a physical presence;

C. Issue an order that the parties' ICA does not require any compensation for Pac-West's VNXX traffic:

D. Direct Pac-West to follow the change of law procedures contained in its interconnection agreement with Qwest to implement the *Core Forbearance Order*;

E. Invalidate all Pac-West bills to Qwest seeking or charging reciprocal compensation or the *ISP Remand Order* rate of \$0.0007 per minute for any of the VNXX traffic described above;

F. Issue an order prohibiting Qwest from routing VNXX traffic to Pac-West utilizing LIS facilities; and

G. Any and all other equitable relief that the Commission deems appropriate.

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111

1 RESPECTFULLY SUBMITTED this 22nd day of August, 2005.

2
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